

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS STAPLE,

Defendant-Appellant.

UNPUBLISHED

September 17, 2002

No. 231239

Wayne Circuit Court

LC No. 00-002628

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316, second-degree murder, MCL 750.317, possession of a firearm during the commission of a felony, MCL 750.227b, and armed robbery, MCL 750.529. After vacating the armed robbery conviction, the trial court sentenced defendant to life in prison without parole for the first-degree murder conviction, to be served concurrently with forty-five to ninety years' imprisonment for the second-degree murder conviction and consecutively to a two-year prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences for first-degree murder and felony-firearm but vacate the conviction and sentence for second-degree murder.

Defendant first argues that his trial attorney rendered ineffective assistance of counsel by failing to use peremptory challenges to dismiss two jurors who allegedly were biased. Because defendant did not raise this issue below, our review is limited to mistakes apparent from the record. *People v Barclay*, 208 Mich 670, 672; 528 NW2d 842 (1995). Under the two-pronged test for establishing ineffective assistance of counsel, defendant must show that counsel's performance was deficient according to prevailing professional norms and that the deficiency was so prejudicial that defendant was deprived of a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). On this latter point, defendant must demonstrate a reasonable probability that but for counsel's unprofessional error or errors, the trial outcome would have been different. *Id.* at 302-303. Defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. *Id.* at 302.

Defendant claims that his attorney should have used peremptory challenges to remove one juror who had police officers as friends and another juror whose brother and a close friend had been victims of a robbery. However, the decision whether to exercise a peremptory challenge is a matter of trial strategy. See generally *People v Colon*, 233 Mich App 295, 301-

302; 591 NW2d 692 (1998). The record in the instant case reveals that counsel exercised peremptory challenges to dismiss other jurors who knew either a police officer or a crime victim. Because a factual record in connection with defendant's ineffective assistance claim was not made, counsel's reasons for deciding not to use peremptory challenges to dismiss the two jurors in question are not known, and it is not apparent from the record that counsel lacked sound strategic reasons for retaining those jurors. We note that the jurors were asked whether they would automatically find a police officer more credible than other witnesses, and none responded affirmatively. Additionally, the juror whose friend and relative were both robbery victims indicated that these experiences would not influence her decision and that she could decide the case strictly on the basis of the evidence presented at trial. There is simply no evidence that the jurors in question were biased against defendant, see *People v Wilson*, 140 Mich App 824, 826; 366 NW2d 53 (1985), and defendant has not sustained his burden of proving ineffective assistance of counsel.

Next, defendant argues that the trial court erred by refusing to instruct the jury on the defense of accident. We review this claim of instructional error de novo. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). A trial court's instructions must include all the elements of the charged offenses and "must not omit material issues, defenses, and theories if the evidence supports them." *Id.*

Here, the trial court ruled that despite defense counsel's claim during closing arguments that the fatal gunshot occurred accidentally during a struggle, the evidence did not support an instruction on the defense of accident. We agree. The evidence showed that the victim had been shot three times. There was no evidence that any of the shots were fired from close range. Moreover, an expert witness testified that the trajectory of the fatal bullet indicated that it was consistent with the shooter having stood over the victim. A police officer responding to a 911 call for a possible armed robbery testified that, as he was approaching the scene of the shooting, he saw one man standing over another man who was on the floor and then saw a man fleeing the building. Additionally, defendant did not testify at trial, and his prior statements introduced at trial, which contradicted one another in several respects, did not support a logical finding by the jury that the victim was shot three times accidentally. Finally, defense counsel's reference to an "accident" in his closing argument did not provide the necessary evidentiary support to warrant an accident instruction. See *People v Mills*, 450 Mich 61, 82, n 15; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). Because the evidence did not logically support an accident instruction, the trial court did not err in refusing to give such an instruction. *Id.* at 81.

Next, defendant argues that double jeopardy principles prohibit him from being convicted and sentenced for both first-degree murder and second-degree murder for the killing of a single person. See *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000). The prosecutor concedes this issue, and we therefore vacate defendant's conviction and sentence for second-degree murder.

In a supplemental brief, defendant argues that his trial attorney rendered ineffective assistance by failing to procure before trial a tape recording of 911 calls made the night of the shooting. However, defendant has failed to argue on appeal how the procurement of these tapes could have aided his defense. See *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1998) ("[a] party may not merely announce a position and leave it to us to discover and

rationalize the basis for the claim”). Moreover, the content of the tapes was discussed at trial, and after our review of the record we fail to discern how defense counsel’s procurement of the tapes before trial would have affected the outcome of the proceedings. Thus, defendant has failed to establish ineffective assistance of counsel with regard to the tapes.¹ *Toma, supra* at 303.

Defendant also sets forth an additional issue in his supplemental brief, but we cannot address it because it is unclear what defendant is arguing; he simply makes a vague reference to a “recorded copy of tape” and to “suppressed interview notes.” At any rate, we have reviewed the record on appeal and find no error requiring reversal with regard to any tape recordings or interview notes.

We affirm defendant’s convictions and sentences for first-degree murder and felony-firearm but vacate defendant’s conviction and sentence for second-degree murder.

/s/ William C. Whitbeck

/s/ Peter D. O’Connell

/s/ Patrick M. Meter

¹ Nor has defendant established that this case should be remanded for an evidentiary hearing on the issue of the tapes, as he tardily argues in his supplemental brief.